Supreme Court, U.S.
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No. 01-1348

In the Supreme Court of the United States

NANCY J. HUKKANEN-CAMPBELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may exclude from her gross income the portion of an award of damages that was retained by her attorney pursuant to a contingent fee agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 274 F.3d 1312. The opinion of the Tax Court (Pet. App. 6a-18a) is reported at 79 T.C.M. (CCH) 2122.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2001. The petition for certiorari was filed on March 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed a lawsuit against her former employer in the United States District Court for the

Western District of Missouri, alleging that she had been constructively discharged from her employment in violation of Title VII. Petitioner sought injunctive relief, back pay, front pay, benefits, attorney's fees and costs. Pet. App. 7a. In connection with that suit, petitioner entered into a contingent fee agreement with her attorneys. That agreement provided that the attorneys would receive all expenses incurrred in connection with the litigation and 45 percent of the total recovery (including any award of attorney's fees), or $125 per hour for all time from the beginning of the case to completion, or the court-awarded fee, whichever figure was greater. In no event, however, was petitioner to receive less than 25 percent of the combined award of damages and attorney's fees, after expenses. *Id.* at 8a.

On April 3, 1992, the district court entered a final judgment awarding petitioner $52,492 in back pay, $44,418 in front pay, $82,534 in pension benefits, $85,227 in attorney's fees, and $1016 in costs. The court of appeals upheld the awards of back pay, front pay and pension benefits, and remanded the attorney's fees award to the district court for further consideration. *Hukkanen* v. *International Union of Operating Eng'rs, Hoisting & Portable Local No. 101*, 3 F.3d 281 (8th Cir. 1993); see Pet. App. 7a.

2. On December 21, 1993, petitioner was paid $150,000 in partial satisfaction of the judgment. Pet. App. 8a. The payment was made by check payable jointly to petitioner and her attorneys. Petitioner received $76,000 of the payment and her attorneys retained $74,000 as legal fees. *Ibid.* On her federal income tax return for 1993, petitioner reported the entire $150,000 payment as "Other income" and reported the

$74,000 in attorney's fees as a miscellaneous itemized deduction. *Ibid.*

The Commissioner issued a deficiency notice to petitioner in the amount of $17,402. Pet. App. 9a. The deficiency resulted from the application of the alternative minimum tax (AMT), which is based on net income calculated without an allowance for various miscellaneous itemized deductions, including attorney's fees. *Ibid.*[1]

Petitioner challenged the deficiency in Tax Court. Petitioner asserted that the portion of the award that was paid to her attorneys pursuant to the contingent fee agreement was not includable in her gross income. The Tax Court concluded, however, that the entire $150,000 was subject to taxation and that the amount paid to her attorneys constituted a miscellaneous itemized deduction. Since a deduction for attorney's fees is disallowed in computing the AMT, the Tax Court upheld the $17,402 deficiency. Pet. App. 17a-18a.

3. The court of appeals affirmed. Pet. App. 1a-5a. The court concluded that the entire amount of the recovery represented gross income to petitioner, for it not only benefitted her directly but also "permitted Petitioner to discharge the personal obligation owed to her attorneys." *Id.* at 3a (citing *Coady* v. *Commissioner*, 213 F.3d 1187, 1191 (9th Cir. 2000); *Baylin* v. *United States*, 43 F.3d 1451, 1454 (Fed. Cir. 1995)). The court further stated that petitioner's assertion (*id.* at 3a):

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[1] Petitioner filed an amended tax return, claiming a refund in the amount of $20,075 on the grounds that the entire amount of her recovery under Title VII was excludable from her income. Pet. App. 2a. The courts below rejected that argument (*id.* at 3a, 9a-13a), and it is not raised in the petition.

that the effect of her contingent fee agreement and the Missouri lien statute alters the analysis is equally unavailing. Petitioner points to rulings in other circuits holding that contingent fees paid directly to attorneys are not taxable income based on the applicable attorney lien statutes. *See, e.g., Foster v. United States*, 249 F.3d 1275 (11th Cir. 2001) (Alabama statute); *Estate of Clarks v. United States*, 202 F.3d 854 (6th Cir. 2000) (Michigan statute); *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959) (Alabama statute). However, the majority of the circuits have rejected this argument. *See, e.g., Kenseth v. Commissioner*, 259 F.3d 881 (7th Cir. 2001) (Wisconsin statute); *Young v. Commissioner*, 240 F.3d 369 (4th Cir. 2001) (North Carolina statute); *Benci-Woodward v. Commissioner*, 219 F.3d 941 (9th Cir. 2000) (California statute); *Coady v. Commissioner*, 213 F.3d 1187 (9th Cir. 2000) (Alaska statute); *Baylin v. U.S.*, 43 F.3d 1451 (Fed. Cir. 1995) (Maryland statute).

Furthermore, the cases Petitioner relies upon are readily distinguished. As the Tax Court correctly noted, the Missouri lien statute, unlike the Alabama and Michigan statutes, does not create a proprietary interest in the recovery on the attorney's behalf. Instead, the Missouri statute simply operates as a manner of ensuring payment to the attorney. As the Seventh Circuit recently observed, an attorney with a lien on settlement "is no different in this respect from any other trade creditor stiffed by his debtor." *Kenseth*, 259 F.3d at 884.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

The same question presented in this case was raised, and resolved adversely to the taxpayer, in *Coady* v. *Commissioner*, 213 F.3d 1187 (9th Cir. 2000), and *Benci-Woodward* v. *Commissioner*, 219 F.3d 941 (9th Cir. 2000). This Court denied the taxpayer's petition for a writ of certiorari in *Coady* on April 16, 2001 (532 U.S. 972), and denied the taxpayer's petition for a writ of certioarari in *Benci-Woodward* on January 16, 2001 (531 U.S. 1112). For the same reasons stated in our brief in opposition to the petition for a writ of certiorari in *Benci-Woodward*, the petition for a writ of certiorari should be denied in this case.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2002

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[2] We are providing herewith to petitioner a copy of the government's brief in opposition to the petition in the *Benci-Woodward* case.